SO ORDERED.

SIGNED this 12 day of August, 2005.

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

John C. Cook
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

IN RE	)	
	)	**No. 05-13087**
DANA L. HOWE	)	
	)	**Chapter 7**
Debtor	)	

MEMORANDUM AND ORDER

On June 3, 2005, Consultants in Pain Management, P.C., filed a motion for relief from the automatic stay, seeking authorization to proceed in state court to seek an injunction prohibiting the debtor from continuing to violate the covenant not to compete set forth in her employment agreement with her former employer. On June 23, 2005, the court conducted a hearing on the motion and entered an order granting it. The order was based on the Sixth Circuit's decision in *Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493 (6th Cir. 2001), which held that a right to an injunction enforcing a covenant not to compete does not constitute a "claim" that is dischargeable in

bankruptcy unless "it is an alternative to a right to payment or if compliance with the equitable order will itself require the payment of money," *id.* at 497. Because, under Iowa law, an injunction "may issue only when the party seeking it has no adequate remedy at law," i.e., "when damages are inadequate for future injuries," the Sixth Circuit held that the right to equitable relief was not a dischargeable "claim" and affirmed the bankruptcy court's decision so holding and terminating the automatic stay to permit the former employees to seek injunctive relief. *Id.* at 498. Because it appeared to the court that Tennessee law, like Iowa law, permits injunctive relief only when there is no adequate remedy at law, *see, e.g.*, *Professional Home Health & Hospice, Inc. v. Jackson-Madison County Gen. Hosp. Dist.*, 759 S.W.2d 416, 420 (Tenn. Ct. App. 1988), the court felt bound by Sixth Circuit precedent to grant relief from the stay.

On June 24, 2005, the debtor filed a notice of appeal and a motion for a stay pending appeal. The Sixth Circuit has recently reiterated the analysis required in disposing of such a motion:

> In considering whether to grant a stay pending appeal, this court applies the traditional four-part injunctive-relief test, which asks:
>
> > (1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies.
>
> In applying this test, we balance the factors. The Appellant must demonstrate a likelihood of success on the merits to a degree inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue. "[I]n order to justify a stay of the district court's ruling, the [Appellant] must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted."

Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 227 (6th Cir. 2004) (citations omitted). This court concludes, first, that the debtor has not shown a strong or substantial likelihood of success on the merits.[1] While the debtor has argued that the *Kennedy* case is not controlling because Tennessee law is different from Iowa law on injunctive relief, the debtor has failed to cite any Tennessee case to support her argument. While she does cite a recent decision of the Tennessee Supreme Court that might be extended to render the debtor's covenant not to compete unenforceable as against public policy, that case has no bearing on whether this court properly granted relief from the stay under *Kennedy*. The enforceability of the covenant is an issue that can and should be determined by the state court.

Second, the debtor has not made a sufficient showing that she will suffer irreparable harm if the court's June 23 order is not stayed, particularly in light of the minimal likelihood of success on the merits. Allowing a state court to decide matters of state law would not constitute irreparable harm to the debtor. Moreover, the automatic stay's protection of the debtor and her property will terminate by its own terms when she receives a discharge, 11 U.S.C. § 362(c)(2)(C), which is anticipated to be granted next week. At that point, the former employer would be free to proceed with its injunction action even if the court had denied its motion for stay relief. The remaining factors for staying the court's order pending appeal do not appear to have any significance in this case.

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[1]The likelihood of success is particularly slight considering that an order granting relief from the automatic stay is reviewable only for an abuse of discretion. *E.g.*, *Camall Co. Steadfast Ins. Co. (In re Camall Co.)*, 16 F. App'x 403, 409 (6th Cir. 2001).

For the foregoing reasons, it is ORDERED the debtor's motion for a stay pending appeal is denied.

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